Supreme Court No. __
(COA No. 57961-8-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES E. PARRILL,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

United States Supreme Court Cases

Constitutional Provisions

Statutes

Treatises

Rules

Other Jurisdictions

Other Sources

A. INTRODUCTION

The legislature enacted the Sentencing Reform Act (SRA) to curtail a judge's discretion and "ensure that defendants who commit similar crimes and have similar criminal histories receive similar sentences." *About Time: How Long & Life Sentences Fuel Mass Incarceration in Washington State*, ACLU Wash. 12 (Feb. 2020).[1] While this was the legislature's goal, the SRA has not resulted in comparable sentencing throughout the state. Washington imprisons its people of color at a considerably disproportionate rate, and our courts impose lengthier sentences upon people of color. *Id*. at 50-52.

This disparity in sentencing extends to a court's decision to impose an exceptional sentence above the standard range. While White defendants are more likely to receive a sentence below the standard range, defendants of color are more likely to

[1] https://www.aclu-wa.org/docs/about-time-how-long-and-life-sentences-fuel-mass-incarceration-washington-state.

receive an exceptional sentence above the standard range. *Examining Washington State's Sentencing Guidelines: A Report for the Criminal Sentencing Task Force*, Wash. St. Inst. for Pub. Pol'y 32 (May 2021).[2]

However, a court can only sentence a person above the standard range if the State proves certain facts to a jury by proof beyond a reasonable doubt. Currently, the SRA has a two-tiered, hybrid procedure before a court can impose a sentence above the standard range. First, the State must prove the aggravators to a jury by proof beyond a reasonable doubt. If the State achieves this, it does not automatically result in an exceptional sentence. While this is a condition precedent to an exceptional sentence, the court can only impose an exceptional sentence if, considering the purposes of the SRA, the court finds there are substantial and compelling reasons justifying an

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[2] https://www.wsipp.wa.gov/ReportFile/1736/Wsipp_Examining-Washington-State-s-Sentencing-Guidelines-A-Report-for-the-Criminal-Sentencing-Task-Force_Report.pdf.

exceptional sentence. In turn, the SRA has seven purposes, including "protect[ing] the public," and "reduc[ing] the risk of reoffending by offenders in the community." RCW 9.94A.010(4), (7). The Court of Appeals interprets this second step of the SRA as a "legal conclusion" that does not require a jury finding or proof beyond a reasonable doubt.

Because people of color are perceived as more violent, such discretionary purposes are rife with the possibility of a judge employing implicit or overt bias in order to impose a sentence above the standard range. *See, e.g.,* Jennifer L. Eberhardt et. al, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. of Personality & Soc. Psych. 876 (2004).

However, this Court has recognized that a jury can act as an important check on a court's discretion and reduce racial disproportionality. *See, e.g., State v. Saintcalle*, 178 Wn.2d 34, 49-50, 309 P.3d 326 (2013). And the Sixth Amendment requires the State to prove to a jury any fact that increases the

punishment for a crime. *Alleyne v. U.S.*, 570 U.S. 99, 107, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

Because the SRA's second step to imposing an exceptional sentence requires fact finding—like the fact that an exceptional sentence would protect the public—this Court should hold that the State must prove whether substantial and compelling reasons exist to a jury with proof beyond a reasonable doubt. This would not only comport with the Sixth Amendment. It would also help reduce the disproportionality in exceptional sentences in Washington based on race. This Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

James Parrill asks this Court to accept review of the Court of Appeals opinion affirming his exceptional sentence of 60 years. The court issued the opinion on May 14, 2024. Mr. Parrill has attached a copy of this opinion to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. 20 years ago, the United States Supreme Court held that Washington's exceptional sentence scheme violated the Sixth and Fourteenth Amendments. The legislature resolved some of the constitutional infirmities, but it created others. Currently, the SRA imposes a two-step, hybrid procedure before a court can impose an exceptional sentence. First, a jury must find, with proof beyond a reasonable doubt, the presence of aggravators. But this does not automatically result in a sentence above the standard range. Instead, the SRA imposes a second step. During this step, a court must consider the policy reasons behind the SRA and determine if those policies counsel in favor of a sentence above the standard range.

This is a fact that increases punishment, so this Court should hold the State must prove the existence of this fact to a jury with proof beyond a reasonable doubt. RAP 13.4(b)(3); RAP 13.4(b)(4). Because the State did not prove the existence

of this fact with proof beyond a reasonable doubt, this Court should reverse the imposition of the exceptional sentence.

2. The Sixth Amendment guarantees the right to a jury trial in two distinct instances. The Sixth Amendment provides the accused with the right to have a jury determine his guilt or innocence. The Sixth Amendment also provides the accused with the right to have a jury determine any facts that affect the permissible range of punishment. Any waiver of the right to a jury trial must be knowing, intelligent, and voluntary.

The court obtained a waiver of Mr. Parrill's right to a jury trial, but it did not obtain a waiver of his right to a jury trial on the facts that would support an exceptional sentence. Instead, the court conducted fact-finding on this issue on its own. This was improper, and this Court should accept review. RAP 13.4(b)(3); RAP 13.4(b)(4).

3. Alternatively, a court can impose an exceptional sentence if, considering the purposes of the SRA, the court finds substantial and compelling reasons justify an exceptional

sentence. The court found substantial and compelling reasons existed, but these reasons do not support an exceptional sentence when a person is subject to an indeterminate life sentence. RAP 13.4(b)(4).

D. STATEMENT OF FACTS

After James Parrill's daughter claimed he sexually assaulted her multiple times, the State charged him with eight sex crimes. CP 1-5. When Mr. Parrill refused to accept a plea and instead decided to exercise his right to a trial, the State added numerous enhancements, aggravators, and charges. 12/2/22RP 11. CP 31-41. Concerning the aggravators, the State alleged Mr. Parrill (1) used a position of trust to commit the crime; (2) committed the crime against a vulnerable victim; and (3) perpetrated the crimes over a prolonged period of time. CP 31-41.

Counsel for Mr. Parrill informed the court he wanted to "waive jury and have a bench trial." 1/30/23RP 8-9. After some back and forth, the court accepted Mr. Parrill's waiver.

1/30/23RP 9-14; CP 46. The court did not ask Mr. Parrill whether he wanted to waive his right to a jury trial on the aggravating factors.

The court found Mr. Parrill guilty of all crimes and enhancements. CP 47-48. The court also found Mr. Parrill guilty of all the aggravating factors alleged in the information except for the vulnerable victim aggravator. CP 47-48.

With the enhancements, Mr. Parrill faced a minimum sentence of 25 years; however, because he was convicted of certain sex offenses, he was subject to an indeterminate life sentence. CP 56-57; RCW 9.94A.507(3)(c)(ii).

At sentencing, the State requested that the court impose an exceptional sentence of 60 years to life. 3/8/23RP 7. For the first time at sentencing, the State also claimed the "free crimes" aggravator supported an exceptional sentence. 3/8/23RP 8; *see* RCW 9.94A.535(2)(c).

The court imposed the requested sentence. CP 58. The court also found that "substantial and compelling" reasons

justified the exceptional sentence. CP 68. The court did not explain its reasoning. CP 68.

E. ARGUMENT

1. This Court should accept review because the SRA's procedure for imposing a sentence above the standard range violates the Sixth and Fourteenth Amendments.

Other than the fact of a prior conviction, a jury must find, with proof beyond a reasonable doubt, any fact that increases punishment U.S. Const. amend. XIV; Const. art. I, § 3; *Alleyne v. U.S.*, 570 U.S. 99, 107, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

> "[*Apprendi v. New Jersey*] concluded that any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime.'"

Alleyne, 570 U.S. at 111 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)) (internal quotations omitted).

20 years ago, *Blakely v. Washington* concluded Washington's SRA violated these tenets, as it permitted a judge

to increase a person's sentence, *i.e.*, impose an exceptional sentence, without the State proving certain facts that increases punishment to a jury beyond a reasonable doubt. 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). For *Blakely* purposes, a "fact" is something that reflects the trier of fact's independent judgment. *See Hurst v. Florida*, 577 U.S. 92, 95-96, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016).

Following *Blakely*, the legislature amended the SRA. First, the SRA requires that a unanimous jury must find one or more of the aggravating factors set forth in RCW 9.94A.535 beyond a reasonable doubt. RCW 9.94A.537(3). However, this does not automatically result in a sentence above the standard range. While this is a condition precedent to a court imposing a sentence above the standard range, a court must engage in a second step before it imposes a sentence above the standard range. RCW 9.94A.537(6).

The second step requires the court to find, "considering the purpose of [the SRA], that there are substantial and

compelling reasons justifying an exceptional sentence." RCW 9.94A.535. In turn, the SRA lists seven purposes the court must consider. RCW 9.94A.010. Some of these purposes include "protect[ing] the public," "promot[ing] respect for the law," and "making frugal use of the state's and local government resources." RCW 9.94A.010 (2), (4), and (6).

This second step involves fact-finding because it requires the court to exercise its independent judgment and discern whether the SRA's purposes counsel in favor of a sentence above the standard range. *State v. Hughes* helps illustrate why a jury must determine whether "substantial and compelling reasons justified an exceptional sentence." RCW 9.94A.535. In *Hughes*, this Court assessed whether an aggravating factor that required the court to determine whether a sentence was "too lenient" without a jury finding complied with *Apprendi* and *Blakely*. 154 Wn.2d 118, 136-37, 110 P.3d 192 (2005). This court held it did not because this determination required a multi-factored, fact-finding approach. *Id*. at 137. Indeed, the

finding that a sentence was "too lenient" did not "entail solely the existence of prior convictions. *Blakely* did not authorize such additional judicial fact finding." *Id.*

Similarly, a finding that both "substantial" and "compelling" reasons, in light of the purposes of the SRA, justify an exceptional sentence requires fact-finding. Like the "too lenient" language this Court disapproved of, a finding that "substantial and compelling" reasons, in light of the seven purposes of the SRA, justify an exceptional sentence necessarily requires a thorough and subjective analysis. It is a more onerous and subjective analysis than the "clearly too lenient" analysis this Court disapproved of in *Hughes*.

The United States Supreme Court's reasoning and ruling in *Hurst* demonstrates the State must prove, beyond a reasonable doubt, whether "substantial and compelling" reasons exist to impose an exceptional sentence. In *Hurst*, the court considered the hybrid procedure Florida used to determine whether courts could impose a death sentence. 577 U.S. at 95.

First, a jury rendered an "advisory sentence" of life or death. *Id*. Second, the court weighed aggravating and mitigating circumstances and independently determined whether it would impose a death sentence. *Id*. at 96. While the jury's advisory sentence of death was a condition precedent to the court's ability to impose a sentence of death, a court could decline to impose a death sentence. It was therefore ultimately up to the judge to assess additional facts and decide whether to impose a death sentence. *Id*. at 95-96.

The United States Supreme Court reversed. The Court found the sentencing court's weighing of factors after it received the jury's recommendation constituted fact-finding. *Id.* at 98-99. Because this fact-finding was "necessary" for the court to increase the punishment for the crime, the court held Florida's procedure violated the Sixth Amendment.

Here, as in *Hurst*, a "substantial and compelling" finding is necessary for the court to impose an exceptional sentence. As relevant here, first, the State must prove, beyond a reasonable

doubt, that one or more aggravating factors exist. RCW 9.94A.535(3). After the State meets this burden, RCW 9.94A.535 provides the court "**may**" impose a sentence beyond the standard range so long as "it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence."

A jury's finding that the State met its burden in proving the aggravating factors is similar to the advisory sentence at issue in *Hurst*. This is because a jury's finding of the existence of aggravators does not automatically result in a sentence above the standard range. While this is one of the essential ingredients in imposing an exceptional sentence, a second essential ingredient must be met. This second hurdle, like the second step at issue in *Hurst*, requires additional fact-finding—it requires a finding that "considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. It is only after this finding is met that the court can impose an exceptional sentence.

Nevertheless, the Court of Appeals refused to find that the SRA violated *Blakely.* Op. at 10-11. The Court of Appeals relied on this Court's previous characterization of the "substantial and compelling" language as a "legal conclusion," and it stated that until this Court "reverses it prior holding," it would follow this characterization. Op. at 11 (referencing *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006))

The Court of Appeals was wrong to rely on *Suleiman* for two reasons. First, *Suleiman* pre-dates *Hurst*, and this Court must follow *Hurst* instead of *Suleiman.* U.S. Const. art. VI; cl. 2. Second, this Court's discussion that this finding is a legal conclusion is dicta, as it was unnecessary to the resolution of the case. *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989).

Here, despite its constitutional requirement to the prove the existence of the "substantial and compelling" fact with proof beyond a reasonable doubt, the State presented zero evidence that, given the purposes of the SRA, substantial and

compelling reasons justified a sentence above the standard range. U.S. Const. amend. XIV; *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Despite the absence of this evidence, the court imposed a sentence above the standard range.

This was in error, and this Court should accept review. RAP 13.4(b)(3), (4).

2. This Court should accept review because the Court of Appeals erroneously held that a court can presume that a person waives his right to a jury trial as to all aggravators when he waives his right to a jury trial as to the underlying crime.

Both the United States Constitution and the Washington Constitution guarantee the accused's right to a jury trial. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. This right helps prevent against governmental oppression, the "overzealous prosecutor," and the "compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). The right to a jury trial "is no mere procedural formality, but a fundamental reservation

of power in our constitutional structure." *Blakely*, 542 U.S. 296, 305-06.

The accused may waive the right to a jury trial, but the waiver of this right must be knowing, intelligent, and voluntary. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). The waiver of the right is "knowing" if the accused waived the right "with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Cf. Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

The right to a jury trial extends to two distinct findings that ultimately affect the accused's sentence. The right to a jury trial provides the accused with the right to have a jury determine his guilt or innocence. *U.S. v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The right to a jury trial also provides the accused with the right to have a jury determine if any facts support a sentence beyond the statutory maximum. *Apprendi v. New Jersey*, 530 U.S. 466, 484-90, 120

S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *accord Ring v. Arizona*, 536 U.S. 584, 598, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

Blakely illustrates the severability between the right to have a jury determine one's guilt and the right to have a jury determine whether aggravators exist that warrant a sentence beyond the statutory maximum. In *Blakely*, the defendant waived his right to a jury trial on guilt and instead pleaded guilty to kidnapping his estranged wife. 542 U.S. at 298. At sentencing, the court held a bench hearing on an aggravated factor, and the court imposed an exceptional sentence. *Id.* at 300. However, the defendant did not waive his right to have a jury determine whether aggravators existed that warranted an exceptional sentence. *Id.* at 302.

The United States Supreme Court found the court's fact-finding on the aggravated factor, absent a validly obtained waiver of the right to a jury trial, violated the defendant's right to a jury trial and reversed. *Id.* at 305, 310. The court noted a

person could plead guilty (and thereby waive his right to a jury trial on his guilt), but could also validly waive his right to a jury trial on the aggravators, so long as the court validly obtained a waiver of the right to a jury trial on the aggravators. *Id.* at 310. The court opined a defendant could move forward with a jury trial on his guilt, but also decide to forego the right to proceed with a jury trial on any aggravators. *Id.* at 310.

The reasoning and ruling in *Blakely* demonstrate that before a court engages in judicial fact-finding on aggravating factors, the court must obtain a valid waiver of the defendant's right to a jury trial on this distinct issue. Numerous jurisdictions agree with this principle. *See, e.g., State v. Dettman*, 719 N.W.2d 644, 651 (Minn. 2006); *State v. Brown*, 129 P.3d 947, 951 (Ariz. 2006); *People v. Montour*, 157 P.3d 489, 497 (Colo. 2007).

The State bears the burden of proving the defendant validly waived his right to a jury trial. *City of Seattle v. Williams*, 101 Wn.2d 445, 450, 680 P.2d 1051 (1984). A court

"must indulge every reasonable presumption against waiver of fundamental rights." *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). This Court cannot presume a valid waiver of the right to a jury trial on aggravating facts based on a silent record. *See Williams*, 101 Wn.2d at 450.

But this is exactly what the trial court and the Court of Appeals did in this case. Here, while the court obtained a waiver of Mr. Parrill's right to a jury trial, the court did not inform Mr. Parrill that he also had the right to a jury trial on the aggravators. It also did not obtain any waiver of Mr. Parrill's right to a jury trial on the aggravating factors. This was in error.

A few days before the court scheduled voir dire, counsel for Mr. Parrill told the court he wanted to "waive jury and have a bench trial." 1/30/23RP 8-9. Counsel informed the court that he told Mr. Parrill about the prejudices from the general public on cases involving sexual misconduct, and Mr. Parrill told counsel he wanted to go forward without a jury. 1/30/23RP 8-9. The court explained how the voir dire process could eliminate

biased jurors and asked whether counsel discussed the "advantages and disadvantages" of waiving the right to a jury trial. 1/30/23 RP 8-12. Mr. Parrill said he discussed this with counsel and reaffirmed he wanted to waive his right to a jury trial. 1/30/23RP 10-14. The court did not ask Mr. Parrill whether he also wanted to waive his right to a jury trial on the aggravating factors.

The court accepted the waiver. RP 14. The court required Mr. Parrill sign a written order. CP 46. Mr. Parrill signed the order. CP 46. The order makes no mention of a waiver of his right to a jury trial on the aggravating factors.

Mr. Parrill's waiver was neither knowing nor intelligent because the court did not inform Mr. Parrill of his separate right to a jury trial on the aggravating factors; it also did not obtain a distinct waiver of his right to a jury trial on the aggravating factors. No evidence exists that Mr. Parrill understood he had a right to a jury trial on both the underlying issue of guilt and the aggravating factors.

However, the Court of Appeals held it could infer that Mr. Parrill waived his right to a jury trial as to the aggravators because by the time he waived, he knew the State was pursuing aggravating factors. Op. at 8. The Court of Appeals was wrong for several reasons. First, to the extent that some Court of Appeals opinions hold a person can implicitly waive his right to a jury trial on aggravating factors, this Court has never stated this is proper. Instead, this Court has stated it has a "strong resistance to implied waiver of jury trial." *Acrey*, 103 Wn.2d at 208. As the final arbiter of state constitutional law, this Court's precedent controls over Court of Appeals precedent. *Hanson v. Carmona*, 1 Wn.2d 362, 383, 525 P.3d 940 (2023).

Second, to the extent that the doctrine of implied waiver exists in this state, the case the Court of Appeals relied on is distinguishable. The Court of Appeals analogized Mr. Parrill's case to *State v. Trebilcock*, 184 Wn. App. 619, 341 P.3d 1004 (2014), where the court reasoned the defendant waived her right to a jury trial as to the aggravating factors as well as the

underlying crime by (1) signing a waiver of her right to a jury trial; (2) stating she understood what she was waiving; and (3) not directing her attorney to rescind her waiver when the State added aggravators to its charging document. Op. at 7. However, here, unlike in *Trebilcock*, counsel never told the court that Mr. Parrill "understood and agreed that the trial judge would be deciding the aggravating factors." 184 Wn. App. 619, 633, 341 P.3d 1004 (2014).

This Court should accept review. RAP 13.4(b)(1), (4).

3. Alternatively, this Court should accept review because no substantial and compelling reasons exist to impose a sentence above the standard range when a person faces an indeterminate life sentence.

If this Court disagrees and believes the "substantial and compelling" finding need not be proved beyond a reasonable doubt, this Court should still accept review. This is because no substantial and compelling reasons justify an exceptional sentence when a person is subject to a mandatory indeterminate life sentence.

Generally, courts impose sentences within the standard range. *See, e.g.,* RCW 9.94A.530(1). However, a court may impose a sentence that exceeds the standard range sentence if (1) the fact-finder finds, beyond a reasonable doubt, that certain aggravators or a particular aggravator exists;[3] and (2) the court finds that, "considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence." *See generally* RCW 9.94A.535.

The legislature has not defined the terms "substantial" and "compelling" under RCW 9.94A.535. However, because this statute allows a court to increase the penalty for a crime significantly, this Court must strictly construe this statute. *State v. Sass*, 94 Wn.2d 721, 726, 620 P.2d 79 (1980).

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[3] Under current Washington law, a court can alternatively impose an aggravated sentence absent a jury finding if the court finds "the defendant has committed multiple current offenses and the defendant's high offender score results in some of the offenses going unpunished." RCW 9.94A.535(2)(c); *State v. Alvarado*, 164 Wn.2d 556, 567, 192 P.3d 345 (2008).

To determine the meaning of "substantial" and "compelling," this Court first examines the statute's plain meaning. *State v. Schwartz*, 194 Wn.2d 432, 439, 450 P.3d 141 (2019). To determine the statute's plain meaning, this Court examines the text of the statute, the context of the statute, related statutory provisions, and the whole statutory scheme. *Id*. Additionally, "[w]hen a statute does not define a term, the court may consider the plain and ordinary meaning of the term in the standard dictionary." *State v. Fuentes*, 183 Wn.2d 149, 160, 352 P.3d 152 (2015).

The dictionary defines "substantial" as "considerable in quality, significantly great." *Substantial*, Merriam-Webster.[4] And the dictionary defines the term "compelling" as "to drive or urge forcefully or irresistibly." *Compel*, Merriam-Webster.[5]

[4] https://www.merriam-webster.com/dictionary/substantial#:~:text=1,imaginary%20or%20illusory%20%3A%20real%2C%20true.

[5] https://www.merriam-webster.com/dictionary/compel.

This Court examines the appropriateness of an exceptional sentence by asking, "(1) are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard?; (2) do the reasons justify a departure from the standard range under the de novo review standard; or (3) is the sentence clearly too excessive or too lenient under the abuse of discretion standard?" *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

The court convicted Mr. Parrill of 10 crimes. CP 56-57. Four of these crimes subjected Mr. Parrill to an indeterminate sentence, with a minimum term of 25 years and a maximum term of life. CP 57; RCW 9.94A.507. Nevertheless, the court imposed an exceptional sentence, requiring a minimum term of 60 years to life. CP 58. The court simply issued a written order stating it found "substantial and compelling reasons," but it did not describe these substantial and compelling reasons. CP 68.

No standard range is longer than life, and so no "significantly great" or "forceful urge"—in other words, no

"substantial and compelling" reasons—calls for a sentence outside of the standard range. Furthermore, because, in light of the purposes of the SRA, neither "substantial" nor "compelling" reasons call for an aggravated sentence where the defendant faces life in prison, this Court should reverse.

Again, the SRA has seven purposes, including (1) ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the person's criminal history; (2) promoting respect for the law by imposing "just" punishment; (3) promoting commensurate punishment with the punishment imposed on others committing similar offenses; (4) protecting the public; (5) offering an opportunity to improve one's self; (6) making frugal use of governmental resources; and (7) reducing the risk of re-offense.

The fact that Mr. Parrill is already serving an indeterminate life sentence shows that, considering the purposes of the SRA, no substantial and compelling reasons exist to impose a 60-year minimum sentence. The

Indeterminate Review Sentencing Board (ISRB) will monitor Mr. Parrill's likelihood of reoffending, and it has the authority to keep him confined him for life if it finds he poses a risk to the community. *See, e.g.,* RCW 9.95.140(2); RCW 9.95.420(1)(a). An exceptional sentence cannot further the goal of protecting the public or reducing the risk of re-offense.

An exceptional sentence also does not further the goal of making frugal use of governmental resources and creating an opportunity to improve one's self. The cost of incarceration increases significantly as people age. Emily Widra, *The aging prison population: Causes, costs, and consequences*, Prison Pol'y Initiative (Aug. 2, 2023).[6] And the fact that Mr. Parrill is serving up to life in prison gives him up to a lifetime of opportunities to improve himself.

The length of the indeterminate sentence already promotes commensurate and "just" punishment, and the penalty

[6] https://www.prisonpolicy.org/blog/2023/08/02/aging/.

is proportionate to the offense and Mr. Parrill's criminal history. Every person convicted of Mr. Parrill's crimes receives an indeterminate life sentence; this certainly reflects the legislature's belief concerning the seriousness of these crimes. *See* RCW 9.94A.507. And Mr. Parrill has no criminal history other than these offenses. CP 57.

This Court should accept review. RAP 13.4(b)(4).

F. CONCLUSION

For the reasons stated in this petition, Mr. Parrill respectfully requests that this Court accept review.

This petition uses Times New Roman Font, contains 4,656 words, and complies with RAP 18.17.

DATED this 13th day of June, 2024.

Respectfully submitted,

/s Sara S. Taboada
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Attorney for Petitioner

Filed
Washington State
Court of Appeals
Division Two

May 14, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES ELLIS PARRILL, Appellant.	No. 57961-8-II UNPUBLISHED OPINION

VELJACIC, A.C.J. — In March 2023, following a bench trial, James Parrill was found guilty of several sex crimes committed against his then 14-year-old biological daughter, H.P. Parrill was sentenced to a 720-month exceptional minimum term based on aggravators found by the judge at trial. Parrill appeals, arguing (1) that he did not waive his right to a jury trial regarding the aggravating factors; (2) that the trial court should not have ruled there were substantial and compelling reasons for imposing an exceptional sentence as required under the Sentencing Reform Act of 1981 (SRA) because the "substantial and compelling reasons" determination is a factual question that should be put to a jury and that there was no evidence presented of "substantial and compelling reasons"; and (3) that imposition of an exceptional sentence when Parrill is already serving the possibility of life in prison is not statutorily permitted and the court failed to separately describe substantial and compelling reasons besides the aggravators; and (4) that the court erred when imposing the victim penalty assessment (VPA) and DNA legal financial obligations.

The State responds that (1) Parrill's written and oral waivers of his right to a jury trial are valid and supported by the record and that the waivers were effective to waive his right to jury trial for the underlying crimes and the aggravators Additionally, the State contends (2) that the trial court's substantial and compelling reasons conclusion is a legal determination, not a fact question, and further, that the aggravating factors support the "substantial and compelling reasons" conclusion; (3) that, overall, the exceptional minimum term is supported by the aggravating factors and is permitted by statute. Finally, the State does not object to the VPA and DNA fees being stricken.

We agree with the State and hold that Parrill validly waived his right to a jury trial on the aggravating factors because the record clearly shows he did so via his written and oral waivers. We also hold that substantial and compelling reasons support the trial court's imposition of an exceptional sentence, as its finding of even one aggravating factor is sufficient. We further hold that the imposition of an exceptional minimum term sentence when one is sentenced to a statutory maximum sentence of life in prison is permitted by statute. Finally, we remand with instructions to strike the VPA and DNA fees.

FACTS

I. BACKGROUND

On December 2, 2022, the State charged Parrill with eight counts of sex crimes committed against his 14-year-old daughter, H.P. The State offered Parrill a plea deal, which he declined. At the time of denying the offer, his attorney acknowledged Parrill was aware that declining the offer would lead to the possibility of the State adding additional counts or enhancements.

The State filed a total of three amended informations. The second amended information added the aggravators at issue here. The third amended information maintained the same aggravating factors and changed the charges only by clarifying the time period for the crime dates alleged.

The second amended information, filed on January 19, 2023, listed charges against Parrill as follows: two counts of rape in the second degree or in the alternative rape of a child in the third degree, two counts of rape of a child in the third degree, two counts of incest in the first degree, two counts of indecent liberties or in the alternative child molestation in the third degree, and two counts of incest in the second degree. And for the first time counts I, II, V, VI, VII, and VIII listed the following associated aggravating factors: (1) the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance; (2) the current offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time; (3) the defendant used his position of trust to facilitate the commission of the current offense; and (4) that the victim was under the age of 15 at the time of the offense.

A week later, at arraignment, Parrill's attorney waived formal reading of the second amended information and entered not guilty pleas to all counts.

II. TRIAL

During a pretrial hearing on January 30, defense counsel stated that he had the opportunity to talk with Parrill and that Parrill had indicated that he would like to waive his right to a jury trial and opt for a bench trial. Defense added, "I explained what the differences are. We briefly talked about prejudices from the general public about cases like this." Rep. of Proc. (RP) (Jan. 30, 2023)

at 9. Counsel then requested the court inquire further with Parrill. The following exchange took place:

> THE COURT: All right. Mr. Parrill, what's your position on what [counsel] just told me?
>
> Mr. PARRILL: I would like to try to go for the bench trial.
>
> THE COURT: Tell me why that is.
>
> MR. PARRILL: Because some people have a set mindset, and you can't change their mind from that.
>
> THE COURT: All right. So you believe that a jury might have some preconceived ideas about a case like this?
>
> MR. PARRILL: I would believe so, yes, sir.
>
> THE COURT: And you understand that part of the process of a jury trial is that you would have an opportunity to see those jurors and listen to what they say, and your attorney would have an opportunity to ask them questions about their—any biases or prejudices that they might have?
>
> We have a jury selection process where the people would all be in this courtroom and both attorneys could have a chance to ask them questions about their notions, their background, their history, and their many biases or prejudices that they might have about a case such as this. Do you understand that?
>
> MR. PARRILL: I understand.
>
> THE COURT: Is that a yes?
>
> MR. PARRILL: Yes.
>
> THE COURT: And is it something that you and your attorney did talk about, this right to a jury trial and the advantages and disadvantages of waiving that right?
>
> MR. PARRILL: Yes.
>
> THE COURT: And so you're still wanting to proceed without a jury and with a bench?
>
> MR. PARRILL: Yes, sir.
>
> THE COURT: And you understand that a collective knowledge of any twelve citizens is vastly superior to that of any judge, even me? Especially me.
>
> MR. PARRILL: I don't know. I don't think that's—yes, I understand.

RP (Jan. 30, 2023) at 9-11. The court then noted it would be best to have Parrill's waiver in writing. The court asked Parrill's attorney if he had discussed waiver with Parrill. The court inquired of Parrill's attorney to determine if Parrill understood the differences between a jury and bench trial. Parrill's attorney answered in the affirmative, and Parrill agreed.

The court asked Parrill again if anything had changed his decision regarding waiver. Parrill conveyed that nothing had changed his decision. Parrill was asked again whether he had any second thoughts about his decision, to which he responded, "I do not." RP (Jan. 30, 2023) at 23. The written waiver was signed by all parties and accepted by the court. Accordingly, the court stated, "based on my acceptance of this jury waiver, we won't be calling in a jury tomorrow." RP (Jan. 30, 2023) at 23. The next day, Parrill's bench trial began.

Ultimately, the court found Parrill guilty of all counts. The court also found beyond a reasonable doubt that the aggravating factors applied to "each and every guilty verdict for which they [were] alleged." RP (Feb. 1, 2023) at 339. The court found the following aggravators: (1) that there was an ongoing pattern of sexual abuse over a prolonged period of time, (2) that Parrill used his position of trust to facilitate the commission of the crimes, and (3) that H.P. was under the age of 15 at the time of the offenses. The court did not find the fourth aggravator alleged by the State: that H.P. was a particularly vulnerable victim beyond a reasonable doubt.

On March 8, 2023, the court concluded that substantial and compelling reasons justified an exceptional sentence and entered an exceptional minimum term of 720 months to a maximum term of life.[1] The sentence is an ISRB[2] sentence. The court stated that "any one of [the] aggravating

[1] Parrill was also sentenced to determinate sentences on his other charges, but they are not addressed here because he raises issues related to only his sentence on the rape in the second degree charge.

[2] ISRB is an acronym for Indeterminate Sentence Review Board. RCW 9.95.001; WASH. DEPT. OF CORRECTIONS, *Hearings & Sentencing, Indeterminate Sentence Review Board (ISRB)*, https://www.doc.wa.gov/corrections/isrb/default.htm (last visited May 6, 2024). An ISRB sentence is an indeterminate sentence wherein the sentencing court orders a minimum term. After the minimum term, the defendant is eligible to go before the ISRB to be considered for release. RCW 9.95.110. A defendant may or may not be released. *Id.* If not released, the defendant may be imprisoned for life.

factors alone would support" its decision. RP (Mar. 8, 2023) at 17. The court also found Parrill indigent. However, the court imposed a $500 VPA and $100 DNA fee. Parrill appeals.

ANALYSIS

I. WAIVER OF JURY TRIAL

A. Legal Principles

An appellant may argue for the first time on appeal that the record is insufficient to satisfy the constitutional requirements for waiver of the right to a jury trial. *State v. Cham*, 165 Wn. App. 438, 446-47, 267 P.3d 528 (2011). "We review the sufficiency of the record to establish a valid waiver de novo." *Id.* at 447.

A "defendant has the right to a jury trial on any aggravating factor that supports an exceptional sentence, except the fact of a prior conviction." *Id.* at 446. With a few exceptions, RCW 9.94A.535(3) provides an exclusive list of aggravating factors that can support a sentence above the standard range.

For a waiver of the right to a jury trial to be valid, the "record must adequately establish that" the waiver was knowing, intelligent, and voluntary. *State v. Benitez*, 175 Wn. App. 116, 128, 302 P.3d 877 (2013). "The State bears the burden of establishing a valid waiver, and absent a record to the contrary," we indulge "in every reasonable presumption against waiver." *Cham*, 165 Wn. App at 447. Where a defendant waives their right to a jury trial, the trial court does not need to engage in a colloquy or give "'on-the-record advice as to the consequences of [the] waiver.'" *Id.* (quoting *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994)). A record sufficiently demonstrates a waiver's validity if it "'includes either a written waiver signed by the defendant, a personal expression by the defendant of an intent to waive, or an informed acquiescence.'" *State*

v. Trebilcock, 184 Wn. App. 619, 632, 341 P.3d 1004 (2014) (quoting *Cham*, 165 Wn. App. at 448).

In *Trebilcock*, this court held that during a bench trial, a defendant validly waived her right to a jury trial on aggravating factors although she waived before the State amended the charging document adding aggravating factors. 184 Wn. App. at 632-33. This court reasoned that because the defendant signed a written waiver; her attorney stated that the parties had discussed the decision to waive for months; the defendant stated on the record that she understood the right she was waiving; the attorney did not move to rescind her waiver following the addition of the aggravating factors, and because defense counsel indicated multiple times at trial and sentencing that the defendant understood and agreed to the judge's decision on the aggravating factors, her waiver was valid. *Id.* Consequently, the court held that when a defendant waives jury trial, that waiver is for all purposes *Id.* at 632-33. Therefore, when a defendant waives jury trial, they also waive the right to a jury on any aggravating factors *Id.* at 631-34.

B. Analysis

As an initial matter, Parrill concedes that he waived his right to a jury trial. However, he argues that he did not waive his right to a jury trial *regarding the aggravating factors* because he did not know that he was entitled to a jury trial on the factors nor did the court inform him of that right. Parrill argues that in order for his waiver to be effective as to the aggravating factors, the court instead needed to obtain a separate waiver of his right to a jury trial on the aggravating factors.

The State responds that Parrill's written and oral waivers on January 30 are effective to waive a jury trial not only as to the charges, but as to the aggravating factors as well. This is so, it argues, because Parrill waived the jury trial after not objecting to the second amended information, which is the information wherein the State added the aggravating factors. We agree with the State.

Here, the record is clear that the State filed a second amended information, adding the aggravators on January 19, 2023. Therefore, by the time Parrill and his attorney waived a jury trial on January 30, Parrill was well aware that the State was pursuing aggravating factors. Consequently, as the case's procedural history clearly establishes, when Parrill waived, he did so knowing he was waiving a jury trial for not only the underlying crimes but also the aggravating factors contained in the charging document.

Additionally, following a lengthy discussion between the court and Parrill and an oral decision to waive a jury trial, Parrill signed a written waiver form. Parrill never moved to rescind his waiver. Accordingly, we conclude that just as in *Trebilcock*, Parrill's waiver was a wavier "for all purposes," including "the right to have a jury decide any aggravating factor that supports an exceptional sentence." 184 Wn. App. at 632.[3]

II. IMPOSITION OF AN EXCEPTIONAL SENTENCE PURSUANT TO THE SRA

A. The Requirement That There Be Substantial and Compelling Reasons Justifying an Exceptional Sentence Is a Conclusion of Law Not a Question of Fact.

1. Legal Principles

Whether the imposition of an exceptional sentence violates the Sixth and Fourteenth Amendments to the United State Constitution is a question of law that we review de novo. *State v. Alvarado*, 164 Wn.2d 556, 563, 192 P.3d 345 (2008). The Sixth Amendment provides criminal

[3] Parrill also argues that we should not imply that he waived jury under the doctrine of implied waiver recognized in *Cham.* However, given our conclusion above we need not reach this.

defendants with a right to a jury trial. This right, in conjunction with the due process clause of the Fourteenth Amendment, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 104, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (plurality opinion).

A trial court may impose an exceptional sentence outside the standard range if it concludes that "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. Whenever the court imposes an exceptional sentence, it must set forth the reasons for its decision in written findings of fact and conclusions of law. *Id.* However, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

In other words, "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to the jury." *Hurst v. Florida*, 577 U.S. 92, 97, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016) (alteration in original) (quoting *Apprendi*, 530 U.S. at 494).

On appeal, an exceptional sentence may be upheld "even where all but one of the trial court's reasons for the sentence have been overturned." *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993).

2. Analysis

Parrill asserts error because, he argues, the trial court should have required the State prove substantial and compelling reasons beyond a reasonable doubt to a jury not a judge, before imposing the exceptional sentence.

Parrill relies on *Hurst* for the proposition that the Washington sentencing scheme under the SRA, like the Florida scheme, is a hybrid procedure that requires the determination of an additional fact—"substantial and compelling reasons"—before imposition of a sentence above the standard range.

The State responds that "substantial and compelling reasons" is not a question of fact to be put to a jury, and therefore, it was not required to prove it as an element beyond a reasonable doubt. The State further argues that an aggravating factor found by the trier of fact is sufficient to support the "substantial and compelling" legal conclusion and that *Blakely* does not require this legal conclusion be tried to a jury. We agree with the State.

This court previously rejected Parrill's argument in *State v. Sage*, 1 Wn. App. 2d, 685, 407 P.3d 359 (2017). The defendant in *Sage* argued that the trial court engaged in fact finding, in violation of his Sixth Amendment right to a jury trial, by entering an exceptional sentence. *Id.* at 707. This court disagreed. *Id.* at 710. *Sage* relied on *State v. Suleiman*, 158 Wn.2d 280, 290-91, 291 n.3, 143 P.3d 795 (2006), which expressly concluded that whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence is a legal conclusion left for the judge to determine.

Additionally, *Hurst* is inapposite. In that case, Florida's sentencing scheme for a defendant convicted of a capital felony required the sentencing court to conduct a subsequent evidentiary hearing before a jury. 577 U.S. at 95. The jury provided a recommendation of a life or death sentence without stating the factual basis of its recommendation. *Id.* at 95-96. Although the trial court would consider the jury's recommendation, the court exercised independent judgment to determine factually whether a death sentence was justified. *Id.* at 96. The Supreme Court held that Florida's capital punishment sentencing *scheme violated the Sixth Amendment because it*

directed the trial court to engage in fact finding to determine whether there were sufficient aggravating circumstances in support of a death sentence. Id. at 98-99 (emphasis added). That is not the case in Washington. Instead, a jury, not a judge, determines the existence or non-existence of aggravating factor(s) under a "beyond a reasonable doubt" standard. Our Supreme Court expressly concluded in *Suleiman* that the subsequent "substantial and compelling reasons" determination in the Washington SRA is a legal conclusion—not a fact—made by the judge. 158 Wn.2d at 290-91. Consequently, *Hurst* is inapplicable. Even if it was decided after *Suleiman*, its reasoning does not undermine *Suleiman*, which remains controlling.

Until our Supreme Court reverses its prior holding that the "substantial and compelling reasons" requirement from our SRA is a legal conclusion, we will not ignore precedent.

B. An Indeterminate Life Sentence Does Not Bar the Imposition of An Exceptional Minimum Term Sentence Under the SRA.

1. Legal Principles

Next, Parrill argues the fact that he "is already serving an indeterminate life sentence shows that, considering the purposes of the SRA, no substantial and compelling reasons exist to impose a 60-year minimum sentence." Br. of Appellant at 29. He adds that the imposition of the exceptional minimum term sentence does not further the goal of protecting the public, reducing the risk of re-offending, or making frugal use of governmental resources. Lastly, Parrill argues that the length of the indeterminate sentence imposed (i.e. life) already promotes "commensurate and 'just'" punishment as the penalty is proportionate to the offense and his criminal history. *Id.* at 30. We disagree.

2. Analysis

Notably, this court previously rejected this exact argument in the unpublished decision of *State v. Hurley*, No. 55396-1-II (Wash. Ct. App. Nov. 1, 2022) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2055396-1-II%20Unpublished%20Opinion.pdf. The court in *Hurley* relied on the plain language of RCW 9.94A.507 and 9.94A.535. Slip op. at 8. We adopt *Hurley's* reasoning.

As the *Hurley* court explained, those convicted of child molestation in the first degree are sentenced under the provisions outlined in RCW 9.94A.507. *Id.* In *Hurley's* case, specifically, subsection (3)(c)(i). *Id.* Similarly, offenders convicted of rape in the second degree, and who are subject to an aggravating factor finding that the victim was under the age of 15 at the time of the offense, are also sentenced under RCW 9.94A.507, specifically subsection (3)(c)(ii). Just like in *Hurley,* under RCW 9.94A.507(3)(c)(ii), the court must impose a minimum term and a maximum term—which is exactly what it did here. Accordingly, we conclude that an indeterminate life sentence does not bar the imposition of an exceptional minimum sentence pursuant to RCW 9.94A.507.

III. VICTIM PENALTY ASSESSMENT AND DNA FEE

Parrill argues that the VPA and DNA fees should be stricken because the trial court determined he was indigent at the time of sentencing and the recent statutory amendments require it so. The State does not object, noting that under the current version of RCW 7.68.035 the fee must be waived if the defendant makes a motion.

Recent legislative changes eliminated the DNA collection fee unless the defendant's DNA was previously collected as a result of a prior conviction. LAWS OF 2023, ch. 449, § 4.

Similarly, RCW 7.68.035(1) that imposes a victim penalty assessment fee "for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor," was also amended, allowing waiver of the fee if the superior court finds that "the defendant, at the time of sentencing" was indigent. LAWS OF 2023, ch. 449, § 1.

Here, the record shows that the trial court found Parrill indigent at sentencing. Accordingly, we remand with instructions to strike the DNA collection fee and VPA in light of the recent statutory changes. RCW 43.43.7541(2); RCW 7.68.035(4)-(5)(b).

CONCLUSION

We conclude that Parrill waived his right to a jury trial regarding the aggravating factors. We also conclude that the trial court's imposition of an exceptional sentence was without error. Accordingly, we affirm the convictions. However, we remand with instructions to strike the VPA and DNA fees in light of statutory amendments and the State's lack of objection.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljačić, A.C.J.

We concur:

Glasgow, J.

Price, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 57961-8-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: June 13, 2024

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